



FEDERAL LABOR RELATIONS AUTHORITY (FLRA)

[FLRA Docket No. DE-CA-08-0046]

**Notice of Opportunity to Submit Amici Curiae Briefs in an Unfair-Labor-Practice Proceeding Pending Before the Federal Labor Relations Authority**

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Notice.

**SUMMARY:** The Federal Labor Relations Authority provides an opportunity for all interested persons to submit briefs as amici curiae on a significant issue arising in a case pending before the Authority. The Authority is considering this case pursuant to its responsibilities under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and its unfair-labor-practice (ULP) regulations, set forth at 5 C.F.R. part 2423. The issue concerns whether a presidential order, which was issued under § 7103(b)(1) of the Statute to exclude an agency subdivision “from coverage under” the Statute, precludes the Authority from finding that an employee of the excluded subdivision acted as a “representative of the agency” under § 7114(a)(2)(A) and (B) of the Statute. Because the Authority has not directly addressed this issue before, there is an absence of controlling precedent. And, as this matter is likely to be of concern to

agencies, labor organizations, and other interested persons, the Authority finds it appropriate to provide for the filing of amici briefs addressing this matter.

**DATES:** Briefs must be received on or before **[30 days after publication in the Federal Register]**.

**ADDRESSES:** Mail or deliver briefs to Gina K. Grippando, Chief, Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW., Washington, DC 20424-0001.

**FOR FURTHER INFORMATION CONTACT:** Gina K. Grippando, Chief, Case Intake and Publication, Federal Labor Relations Authority, (202) 218-7740.

**SUPPLEMENTARY INFORMATION:** In Case No. DE-CA-08-0046, the Federal Labor Relations Authority's (FLRA's) Chief Administrative Law Judge (ALJ) issued a recommended order to dismiss a ULP complaint against the U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah (the Respondent) for alleged violations of §§ 7114(a)(2)(B), 7116(a)(1), and 7116(a)(8) of the Statute. The FLRA's Office of the General Counsel (GC) filed exceptions to the recommended dismissal order, and those exceptions are currently pending before the Authority. A summary of the case follows.

## **1. Background and ALJ's Decision**

The Regional Director of the FLRA's Denver Regional Office, which is part of the Office of the GC, issued a ULP complaint alleging that the Respondent

violated §§ 7114(a)(2)(B), 7116(a)(1), and 7116(a)(8) of the Statute when the Air Force Office of Special Investigations (AFOSI) – which is a subdivision of the same parent agency as the Respondent – denied union representation to one of the Respondent’s bargaining-unit employees (the employee) during an AFOSI-conducted investigative interview. According to the complaint, the Respondent and AFOSI worked closely together in the investigation and interview of the employee, and, consequently, when AFOSI denied the employee the union representation that he requested due to an allegedly reasonable belief that the interview might result in discipline, AFOSI acted as a “representative of the [A]gency” (i.e., the Respondent), within the meaning of § 7114(a)(2)(B) of the Statute. As a result, the complaint alleged, the Respondent (but not AFOSI) committed ULPs.

As relevant here, the Respondent denied the complaint’s allegations on the basis that, in Executive Order 12,171, President Carter exercised his authority under § 7103(b)(1) of the Statute to “exclude[ AFOSI] from coverage under” the Statute based on “national[-]security requirements and considerations,” so AFOSI’s actions could not be the basis for a ULP finding against the Respondent. Exec. Order No. 12,171 (Nov. 19, 1979), 44 Fed. Reg. 66,565 (Nov. 20, 1979), *reprinted as amended in* 5 U.S.C. § 7103 note at 647-48 (2012).

The ALJ agreed with the Respondent and found that, because Executive Order 12,171 excludes AFOSI “from coverage under” the Statute, the order

necessarily excludes AFOSI from coverage under every provision of the Statute, including the “representative[-]of[-]the[-]agency” provision in § 7114(a)(2)(B). And as the ALJ found that the order precludes finding that AFOSI acted as a “representative” of the Respondent under § 7114(a)(2)(B), the ALJ concluded that the Respondent could not be found to have committed a ULP based on AFOSI’s actions. Thus, the ALJ recommended that the Authority dismiss the complaint.

## **2. GC’s Exceptions**

The GC filed, with the Authority, exceptions to the ALJ’s recommended order. In the exceptions, the GC contends, as relevant here, that the ALJ erred in finding that AFOSI cannot be a “representative of the [A]gency” (i.e., the Respondent), within the meaning of § 7114(a)(2)(B). The GC argues that, just as the incumbent of a position specified in § 7103(a)(2)(B) of the Statute may be excluded from the Statute’s definition of “employee” and yet still act as a “representative of [an] agency” for purposes of § 7114(a)(2), so may an agency or subdivision that is excluded from coverage of the Statute under § 7103(b)(1) be found to act as a “representative of [an] agency.” The GC argues that a contrary conclusion would “erode the right” to representation under § 7114(a)(2)(B) “by encouraging the use of investigative conduits outside the employee’s bargaining unit, and would otherwise frustrate Congress’ apparent policy of protecting certain federal employees when they are examined and justifiably fear disciplinary action” – a concern that the U.S. Supreme Court found in *NASA v. FLRA*, 527 U.S. 229

(1999), was a permissible basis for the Authority to hold that an inspector general acted as a “representative” of its parent agency, for purposes of § 7114(a)(2)(B). *Id.* at 234. For those reasons, the GC contends that the Authority should not adopt the ALJ’s recommended finding that the § 7103(b)(1)-exclusion order precludes finding that AFOSI was a “representative of” the Respondent under § 7114(a)(2).

### **3. Questions on Which Briefs Are Solicited**

Because the Authority has not directly addressed the issue raised in the GC’s exceptions before, the exceptions involve a question of first impression. Consequently, in connection with the case described above, the Authority is providing an opportunity for the parties and other interested persons to file briefs addressing the following questions:

**When the President of the United States issues an order under § 7103(b)(1) of the Statute and excludes an agency or subdivision thereof “from coverage under” the Statute, does such an order preclude the agency or subdivision from being a “representative of the agency” under § 7114(a)(2)(A) and (B)?**

**Should the Authority interpret Executive Order 12,171 as having that effect with regard to the Air Force Office of Special Investigations?**

**In answering these questions, the parties and other interested persons should address: (1) the wording of the Statute and**

**Executive Order 12,171; (2) principles of statutory construction; (3) legislative history regarding § 7103(b)(1), § 7114(a)(2)(A) and (B), and any other relevant provisions of the Statute; (4) any information regarding the history and purposes of Executive Order 12,171; (5) any applicable precedent, including the relevance, if any, of exclusions that occurred under Section 3(b)(3) of Executive Order 11,491; and (6) policy considerations.**

#### **4. Required Format for Briefs**

All briefs shall be captioned “*U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, Case No. DE-CA-08-0046.*” Briefs shall contain separate, numbered headings for each issue covered. Interested persons must submit an original and four (4) copies of each amicus brief, with any enclosures, on 8 1/2 x 11 inch paper. Briefs must include a signed and dated statement of service that complies with the Authority’s Regulations showing service of one copy of the brief on all counsel of record or other designated representatives, 5 C.F.R. § 2429.27(a) and (c), as well as the Federal Labor Relations Authority Acting Regional Director involved in this case. Accordingly, briefs must be served on: Tiffany Malin, Minahan & Muther, P.C., Attorneys at Law, 5132 W. 26th Ave., Denver, CO 80212; Phillip G. Tidmore, Agency Representative, AFLOA/JACL/LLFSC, Labor Law Relations Branch, 1500 West

Perimeter Road, Suite 1370, Joint Base Andrews, MD 20762; and Tim Sullivan, Acting Regional Director, Federal Labor Relations Authority, Denver Regional Office, 1244 Speer Boulevard, Suite 446, Denver, CO 80204-3581. Interested persons may obtain copies of the ALJ's recommended dismissal order in this case by contacting the Authority's Office of Case Intake and Publication at the address and telephone number set forth above.

Dated: August 11, 2014

Gina K. Grippando  
Chief, Case Intake and Publication

[FR Doc. 2014-19387 Filed 08/14/2014 at 8:45 am; Publication Date: 08/15/2014]